

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHAWN LUNDY,

Defendant.

Case No. CR14-59RSL

ORDER DENYING
DEFENDANT'S MOTION
FOR COMPASSIONATE
RELEASE

This matter comes before the Court on defendant's motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A) (Dkt. # 298). Having considered the motion and the record contained herein,¹ the Court finds as follows:

I. BACKGROUND

Defendant is a 67-year-old inmate currently incarcerated at Federal Correctional Institution Elkton ("FCI Elkton"). Dkts. # 298 at 1–2, # 303 at 5. On November 24, 2014, defendant pled guilty to two offenses: conspiracy to distribute heroin, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846; and possession of counterfeit obligations or securities, in violation of 18 U.S.C. § 472. Dkt. # 203. On March 27, 2015, defendant appeared before the Court for sentencing for these offenses, as well as for his supervised release violations under

¹ The Court finds compelling reasons justify sealing both (1) defendant's motion (Dkt. # 298) and (2) the government's exhibits A and B as they contain defendant's sensitive medical information (Dkt. # 305). The parties' respective motions to seal (Dkts. # 297, # 304) are accordingly GRANTED. The government's motion to file an overlength brief (Dkt. # 302) is also GRANTED.

case no. CR00-283RSL. Dkt. # 242. The Court sentenced defendant to a 120-month prison term and five years of supervised release. Dkt. # 243. Defendant is currently scheduled for release from the custody of the Federal Bureau of Prisons (“BOP”) on September 17, 2022. Dkts. # 298 at 1, # 303 at 5. He now moves for compassionate release.

II. LEGAL FRAMEWORK

The compassionate release statute provides narrow grounds for defendants in “extraordinary and compelling” circumstances to be released from prison early. See 18 U.S.C. § 3582(c). The First Step Act of 2018 amended the procedural requirements governing compassionate release. See id. Prior to the First Step Act’s passage, only the Director of the BOP could bring motions for compassionate release. The Director rarely filed such motions. See, e.g., United States v. Brown, 411 F. Supp. 3d 446, 448 (S.D. Iowa 2019). Congress amended the statute to allow defendants to directly petition district courts for compassionate release. As amended, 18 U.S.C. § 3582(c)(1)(A) states in relevant part,

(c) Modification of an imposed term of imprisonment.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant after the defendant has fully exhausted all administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility, whichever is earlier, may reduce the term of imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; . . .

(ii) . . .

and that such a reduction is consistent with the applicable policy statements issued by the Sentencing Commission[.]

Prior to passing the First Step Act, Congress directed the Sentencing Commission to promulgate a policy statement defining “extraordinary and compelling reasons” in the compassionate release context. See 28 U.S.C. § 994(t). Section 994(t) provides,

The Commission, in promulgating general policy statements regarding the sentencing modification provisions in [18 U.S.C. § 3582(c)(1)(A)], shall describe what should be considered extraordinary and compelling reasons for sentence reduction, including the criteria to be applied and a list of specific examples. Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason.

The Sentencing Commission implemented this directive from Congress with a policy statement—U.S.S.G. § 1B1.13. In relevant part, the policy statement provides,

**Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)
(Policy Statement)**

Upon motion of the Director of the Bureau of Prisons under 18 U.S.C. § 3582(c)(1)(A), the court may reduce a term of imprisonment (and may impose a term of supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment) if, after considering the factors set forth in 18 U.S.C. § 3553(a), to the extent they are applicable, the court determines that—

(1)(A) Extraordinary and compelling reasons warrant the reduction;

...

(2) The defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g); and

(3) The reduction is consistent with this policy statement.

Commentary

Application Notes:

1. **Extraordinary and Compelling Reasons.**—Provided the defendant meets the requirements of subdivision (2), extraordinary and compelling reasons exist under any of the circumstances set forth below:

(A) Medical Condition of the Defendant—

(i) The defendant is suffering from a terminal illness (i.e., a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (i.e., a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.

(ii) The defendant is—

(I) suffering from a serious physical or medical condition,

(II) suffering from a serious functional or cognitive impairment, or

(III) experiencing deteriorating physical or mental health because of the aging process,

that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.

(B) Age of the Defendant.—The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.

(C) Family Circumstances.—

(i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.

(ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.

(D) Other Reasons.—As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

1 2. **Foreseeability of Extraordinary and Compelling Reasons.**—

2 For purposes of this policy statement, an extraordinary and
3 compelling reason need not have been unforeseen at the time of
4 sentencing in order to warrant a reduction in the term of
5 imprisonment. Therefore, the fact that an extraordinary and
6 compelling reason reasonably could have been known or
7 anticipated by the sentencing court does not preclude
8 consideration for a reduction under this policy statement.

9 3. **Rehabilitation of the Defendant.**—Pursuant to 28 U.S.C.
10 § 994(t), rehabilitation of the defendant is not, by itself, an
11 extraordinary and compelling reason for purposes of this policy
12 statement.

13 4. **Motion by the Director of the Bureau of Prisons.**—A
14 reduction under this policy statement may be granted only upon
15 motion by the Director of the Bureau of Prisons pursuant to 18
16 U.S.C. § 3582(c)(1)(A). The Commission encourages the
17 Director of the Bureau of Prisons to file such a motion if the
18 defendant meets any of the circumstances set forth in Application
19 Note 1. The court is in a unique position to determine whether
20 the circumstances warrant a reduction (and, if so, the amount of
21 reduction), after considering the factors set forth in 18 U.S.C.
22 § 3553(a) and the criteria set forth in this policy statement, such
23 as the defendant’s medical condition, the defendant’s family
24 circumstances, and whether the defendant is a danger to the
25 safety of any other person or to the community.

26 This policy statement shall not be construed to confer upon the
27 defendant any right not otherwise recognized in law[.]

28 U.S.S.G. § 1B1.13. The Ninth Circuit has held that U.S.S.G. § 1B1.13 “is not an ‘applicable
policy statement’ for 18 U.S.C. § 3582(c)(1)(A) motions filed by a defendant.” United States v.
Aruda, 993 F.3d 797, 802 (9th Cir. 2021). The Court may consider U.S.S.G. § 1B1.13 in
exercising its discretion, but the policy statement is not binding. Id.; see United States v. Van
Cleave, Nos. CR03-247-RSL, CR04-125-RSL, 2020 WL 2800769, at *3–5 (W.D. Wash. May
29, 2020) (referring to the guidance of U.S.S.G. § 1B1.13 as “persuasive, but not binding”).

III. DEFENDANT'S CIRCUMSTANCES

a. Exhaustion Requirement

Prior to considering the merits of defendant's motion, the Court must determine whether he has met the statutory exhaustion requirement for compassionate release. See 18 U.S.C. § 3582(c)(1)(A). The Ninth Circuit recently held that "§ 3582(c)(1)(A)'s administrative exhaustion requirement imposes a mandatory claim-processing rule that must be enforced when properly invoked." United States v. Keller, Nos. 20-50247, 21-50035, 2021 WL 2695129, at *3 (9th Cir. July 1, 2021). The government contends that defendant has not satisfied this exhaustion requirement because defendant did not attach any compassionate release request to his motion and the government was unable to independently corroborate that such a request was ever made to the Warden. Dkt. # 303 at 10.

Defendant's reply attached a letter from defendant's attorney dated April 27, 2020, requesting that "Mr. Lundy be permitted to serve the balance of his sentence in home confinement." Dkt. # 307-1 at 1. Nowhere does the request mention "compassionate release" or 18 U.S.C. § 3582(c)(1)(A). And nowhere does the letter request that the duration of his sentence be reduced or terminated entirely. See Dkt. # 307-1 at 2 (requesting "to complete the balance of his sentence in home confinement"). Rather, the April 27, 2020 letter referenced then-Attorney General Barr's memorandum expanding the cohort of inmates who could be considered for home confinement pursuant to the CARES Act. Dkt. # 307-1 at 1; Office of the Attorney General, Memorandum for Director of Bureau of Prisons: Increasing Use of Home Confinement at Institutions Most Affected by COVID-19 (Apr. 3, 2020), available at <https://www.justice.gov/file/1266661/download> (last visited July 27, 2021). BOP authority to change a prisoner's placement to home confinement derives from 18 U.S.C. § 3624(c)(2) and 34 U.S.C. § 60541, and it is distinct from the statutory framework governing compassionate release. The Court declines to construe the April 27, 2020 letter as a request for compassionate release and concludes that this letter did not trigger the thirty-day lapse period under 18 U.S.C. § 3582(c)(1)(A). See United States v. Lautenslager, No. 2:17-cr-00053-JAM, 2020 WL 2836777, at *2 (E.D. Cal. June 1, 2020) (request for home confinement is not a request for

1 compassionate release and does not trigger the administrative remedies exhaustion period);
 2 United States v. Holden, 452 F. Supp. 3d 946, 969–71 (D. Or. 2020) (same). Thus, defendant
 3 has failed to exhaust and his motion must be denied accordingly. Even assuming, *arguendo*, that
 4 defendant had met the exhaustion requirement, the Court nevertheless determines that
 5 defendant’s motion for compassionate release must be denied for other reasons.

6 **b. “Extraordinary and Compelling” Circumstances**

7 Defendant’s motion for compassionate release is based primarily on the following:
 8 defendant’s age and medical conditions, including the effects of a traumatic brain injury suffered
 9 during his incarceration, and his heightened risk for developing serious complications if he
 10 contracts COVID-19 again while incarcerated at FCI Elkton.² Dkt. # 298 at 2–10. The Court
 11 addresses each of these rationales in turn, beginning with defendant’s reasoning related to
 12 COVID-19 risk.

13 The Court need not reiterate the widely known information regarding the symptoms of
 14 COVID-19 and the devastating global impact of the virus. COVID-19 has created
 15 unprecedented challenges for federal prisons, where inmate populations are large and close
 16 contact between inmates is unavoidable. As of July 27, 2021, the BOP reports 214 federal
 17 inmates and 137 BOP staff have active, confirmed positive COVID-19 test results. See COVID-
 18 19 Coronavirus, Fed. Bureau of Prisons, <https://www.bop.gov/coronavirus/> (last visited July 27,
 19 2021). Since the BOP reported its first case in late March 2020, at least 240 federal inmates and
 20 four BOP staff members have died from the virus. Id. FCI Elkton currently reports zero inmates
 21 and one staff member with active, positive COVID-19 test results. Id. BOP has classified 784
 22 inmates and 85 staff at FCI Elkton as having “recovered” from the virus and nine inmates as
 23 having died from it. Id. The Court acknowledges that the COVID-19 outlook is not as bleak as it
 24 was last spring given vaccination progress in BOP facilities. See COVID-19 Coronavirus, Fed.
 25 Bureau of Prisons, <https://www.bop.gov/coronavirus/index.jsp> (last visited July 27, 2021)

26 _____
 27 ² Defendant tested positive for COVID-19 while at FCI Elkton. Dkt. # 298-1 at 26. BOP medical
 28 records indicate that he had no serious complications. Dkt. # 305 at 9, 42 (reflecting “asymptomatic” in
 July 2020).

1 (reflecting that 1,103 inmates are vaccinated at FCI Elkton). Almost 80% of FCI Elkton's
2 inmate population is now vaccinated. See FCI Elkton, Fed. Bureau of Prisons, [https://www.bop.](https://www.bop.gov/locations/institutions/elk/)
3 [gov/locations/institutions/elk/](https://www.bop.gov/locations/institutions/elk/) (last visited July 27, 2021) (reflecting a population of 1,393 total
4 inmates).

5 Defendant claims that he is more vulnerable to COVID-19 because of his hypertension
6 and overweight condition. Dkt. # 298 at 7. The CDC has identified hypertension and overweight
7 as conditions that can make a person more likely to get severely ill from COVID-19. See People
8 with Certain Medical Conditions, CDC (May 13, 2021), [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html)
9 [ncov/need-extra-precautions/people-with-medical-conditions.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html) (last visited July 27, 2021).
10 BOP medical records reflect, however, that defendant's hypertension is in remission, Dkt.
11 # 298-1 at 25, Dkt. # 305 at 26, which defendant acknowledges. Dkt. # 298 at 7. As for
12 defendant's overweight condition, only ten pounds separate defendant from being a normal
13 weight. See Healthy Weight, Nutrition, and Physical Activity, CDC, [https://www.cdc.gov/](https://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/english_bmi_calculator/bmi_calculator.html)
14 [healthyweight/assessing/bmi/adult_bmi/english_bmi_calculator/bmi_calculator.html](https://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/english_bmi_calculator/bmi_calculator.html) (last visited
15 July 27, 2021) (calculating the BMI with a height of 69 inches and 168 pounds instead of 178
16 pounds); Dkt. # 298-1 at 27; Dkt. # 305 at 30. The conditions defendant points to provide little
17 persuasive force for the conclusion that defendant would be much more vulnerable to COVID-
18 19 than the typical inmate. That said, defendant's age, sixty-seven years, places him on the
19 higher end of the spectrum for vulnerability to COVID-19. Risk for COVID-19 Infection,
20 Hospitalization, and Death By Age Group, CDC (July 19, 2021), [https://www.cdc.gov/](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html)
21 [coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html](https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-age.html)
22 (last visited July 27, 2021).

23 Even if the Court were inclined to find that defendant's vulnerability to COVID-19
24 would constitute an extraordinary and compelling reason for compassionate release based on his
25 hypertension (in remission), overweight condition, and age, the government has presented
26 evidence related to defendant's access to COVID-19 vaccination that undercuts defendant's
27 argument. Defendant was offered the Moderna COVID-19 vaccine on February 26, 2021, and he
28 refused it. Dkt. # 305 at 43. The overwhelming scientific consensus is that vaccination is a safe

1 and effective way to avoid contracting the virus. Key Things to Know About COVID-19
 2 Vaccines, CDC (June 25, 2021), [https://www.cdc.gov/coronavirus/2019-ncov/vaccines/](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html)
 3 [keythingstoknow.html](https://www.cdc.gov/coronavirus/2019-ncov/vaccines/keythingstoknow.html) (last visited July 27, 2021). Defendant does not address his refusal of the
 4 Moderna COVID-19 vaccine. See generally Dkt. # 307. Defendant's failure to offer any
 5 explanation for his decision to decline the vaccine weighs against compassionate release on the
 6 basis of vulnerability to COVID-19. See United States v. Baeza-Vargas, No. CR-10-00448-010-
 7 PHX-JAT, 2021 WL 1250349, at *2–3 (D. Ariz. Apr. 5, 2021) (“Judges of this Court, as well as
 8 others around the country, have ruled with consistency that an inmate’s denial of a COVID-19
 9 vaccination weighs against a finding of extraordinary and compelling circumstances.”). The
 10 Court finds that defendant’s argument regarding COVID-19 vulnerability does not establish an
 11 extraordinary and compelling basis for compassionate release.

12 With respect to defendant’s argument regarding his age and medical conditions unrelated
 13 to COVID-19, this argument is also unavailing. Defendant asserts that as of the date of
 14 sentencing on March 27, 2015, defendant had a tumor on his kidney, an enlarged prostate, skin
 15 tumors, and a hernia. Dkt. # 298 at 2. Defendant does not assert that these existing conditions
 16 have worsened. Rather, defendant contends that since his incarceration, “additional conditions
 17 have diminished his physical well being [sic] and made his term of incarceration significantly
 18 more onerous.” Id. Defendant alleges that during his incarceration, on April 6, 2016, another
 19 inmate attacked him with a brick. Id. at 2–3. Defendant asserts that he was initially under the
 20 impression that he hurt his head after a fall, not after an assault by a fellow inmate. Id.
 21 Defendant does not explain how he came to his realization regarding the alleged assault. A BOP
 22 neurology consultation report concluded that defendant had a “[traumatic brain injury], post
 23 concussion syndrome,” and observed that defendant reported problems with memory and
 24 dizziness and “feel[ing] in a fog.” Dkt. # 298-1 at 7. After defendant’s injury, he began having
 25 seizures, which continue to be treated by prescription medication. Dkt. # 305 at 3. According to
 26 defendant’s recent clinical encounter on May 28, 2021, defendant reported that he had to
 27 withdraw from the RDAP program because he could not take the “mental stress/focus” it
 28 requires, and he reported that he continues to feel “foggy.” Dkt. # 305 at 3. Defendant also

1 highlights that he has been assigned a cell on the first floor and a lower bunk. Dkt. # 298 at 6;
2 Dkt. # 305 at 44.

3 Defendant argues that his circumstances related to age and health are extraordinary and
4 compelling because they are encompassed by the policy statement commentary defining this
5 term, specifically, U.S.S.G. § 1B1.13 Note 1(B) (“Age of the Defendant”). See Dkt. # 298 at 9
6 (“U.S.S.G. § 1B1.13, application note 1(B) provides further basis for a reduction in sentence.”).
7 Although the U.S.S.G. § 1B1.13 policy statement is not binding, Aruda, 993 F.3d at 802, the
8 Court finds it instructive regarding the type of circumstances that would be extraordinary and
9 compelling. Under Note 1(B), extraordinary and compelling reasons exist based on age when
10 the “defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical
11 or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent
12 of his or her term of imprisonment, whichever is less.” U.S.S.G. § 1B1.13, cmt. n.1(B). The
13 government does not address Note 1(B) specifically and appears to analyze the import of
14 defendant’s medical conditions exclusively as they relate to defendant’s vulnerability to
15 COVID-19.

16 Here, defendant obviously meets condition (i) of Note 1(B) because he is 67 years old. It
17 appears that condition (iii) would be met as of August 27, 2021, at which point defendant will
18 have served seventy five percent of his sentence. Dkt. # 298 at 9. Condition (ii), however, is not
19 met here. Although defendant has a seizure disorder and has reported that he has had trouble
20 focusing, Dkt. # 305 at 3–5, 14–16, this does not constitute “serious deterioration in physical or
21 mental health because of the aging process.” At his May 28, 2021 clinical encounter, defendant
22 shared that he does well for “8 hours / day” before feeling foggy and wanting to nap in the
23 afternoon. Id. at 3. Defendant has recently worked a job preparing packaged meals and he was
24 able to complete a drug education program a few months ago. Id.; Dkt. # 298-1 at 24. The status
25 of defendant’s health appears much better than that of defendants for whom courts have granted
26 relief based on circumstances related to age and deterioration of health. See, e.g., United States
27 v. Mondaca, No. 89-CR-0655 DMS, 2020 WL 1029024, at *3 (S.D. Cal. Mar. 3, 2020) (finding
28 condition (ii) met where individual was enrolled in general chronic care clinic; was diagnosed

1 with prostatic hypertrophy, mild-to-moderate degenerative disc disease, and decrease in
2 memory; was placed on suicide watch after being assaulted; and who had withdrawn to his cell
3 out of fear of interaction with other inmates). Defendant has offered insufficient support for the
4 conclusion that his health has so deteriorated such that it would be appropriate to consider his
5 circumstances extraordinary and compelling. Having determined that defendant has not made
6 the requisite showing of extraordinary and compelling reasons for compassionate release, the
7 Court need not analyze whether a reduction in defendant's sentence would be consistent with the
8 factors set forth in 18 U.S.C. § 3553(a).

9 **IV. CONCLUSION**

10 For all the foregoing reasons, defendant's motion for compassionate release (Dkt. # 298)
11 is DENIED. The parties' respective motions to seal (Dkts. # 297, # 304) are GRANTED. The
12 government's motion to file an overlength brief (Dkt. # 302) is also GRANTED.

13 IT IS SO ORDERED.

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15 DATED this 27th day of July, 2021.

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19 Robert S. Lasnik
20 United States District Judge
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